No. 03-1500

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FAMILY ASSOCIATION CENTER FOR LAW & POLICY IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus, American Family Association Center for Law & Policy (AFA CLP), is the legal arm of American Family Association, Inc., a pro-family organization incorporated in 1977 under the name of National Federation for Decency, Inc. with hundreds of thousands of supporters nationwide. AFA CLP is a public interest-type law firm specializing in First Amendment litigation. AFA CLP attorneys have participated as amicus curiae in numerous cases in this Court. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. American Library Ass'n*, 539 U.S. 194 (2003); *American Coalition of Life Activists*, 539 U.S. 958 (2003); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Children's Legal Foundation, Inc. v. Action for Children's Television*, 537 U.S. 886 (1992); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

Additionally, AFA CLP attorneys have litigated cases involving Establishment Clause challenges to public displays of the Ten Commandments, most recently in *Baker v. Adams County*, 86 Fed. Appx. 104, 2004 WL 68523 (6th Cir. 2004), *petition for cert. filed*, 72 USLW 3769 (June 14, 2004). As a result, AFA CLP has developed an expertise and keen interest in this area of the law and believes its perspective may be of benefit to the Court.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members and its counsel made a monetary contribution to the preparation and submission of this brief.

I. *LEMON*[2] MUST BE REPLACED

This Court's Establishment Clause jurisprudence is "in hopeless disarray." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). The *Lemon* test has resulted in an endless line of confusing and conflicting decisions which serve little or no precedential value and leave both lower courts and citizens alike groping to discern the constitutionality of contemplated governmental action. *See, e.g., Committee for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (noting the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"). As one commentator on *Lemon* has observed, "[i]n thirty years the test has earned nothing but ridicule from both academia and the bench." Adam M. Conrad, Note, *Hanging The Ten Commandments On The Wall Separating Church And State: Toward A New Establishment Clause Jurisprudence*, 38 Ga. L. Rev. 1329, 1356 (2004).[3]

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[2] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[3] This point is more fully developed in several briefs filed in support of the displays in this case. *See, e.g.,* Petitioners' Brief in *McCreary County, Kentucky v. ACLU*; Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund, 2004 WL 2825470, *4; Brief of Amicus Curiae The Rutherford Institute, 2004 WL 2825468, *13; Brief of Amicus Curiae Pacific Justice Institute, 2004 WL 2851010, *6. Curiously, not a single brief supporting the respondent in *McCreary County* or the petitioner in *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003) could be found questioning the wisdom of retaining *Lemon*. *See, e.g.,* Brief of Amici Curiae American Humanist Association, et al., 2004 WL 2911173, *8 ("The Lemon test, as a 'fail one, fail all' three-prong test, is a sensible reflection of the values embodied in the Establishment Clause, and remains an eminently workable and dynamic model to assess the constitutionality of government activity"); Brief of Amicus Curiae Council for Secular Humanism, 2004 WL 2899174, *19. One

(Continued on following page)

A. *Lemon* is Unduly Fact-Sensitive.

The Fifth Circuit accurately described the inquiry under *Lemon* as "fact-sensitive," and noted that placing the Ten Commandments monument in the proper context is "a delicate task." *Van Orden v. Perry, supra*, 351 F.3d at 178. In fact, the test has devolved into a highly subjective, hyper-fact-sensitive analysis that yields different results from different judges, depending on the inclinations and biases of the judges and on precisely how they choose to weigh and balance the various factual nuances of the case before them.

This mulling of minutiae[4] is not law; it is the setting of social policy. And under our constitutional system, setting policy is the business of the legislature, not the courts. *See, e.g., Furman v. Georgia,* 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) ("[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, (1943) (Frankfurter, J., dissenting) (the Court is not "free to act as though we were a superlegislature").

Amici opposing the displays in these cases amply demonstrate the absurdity of this state of affairs, arguing for instance that the use of a particular translation renders the Texas monument unconstitutional (*see* Brief of Amicus Curiae Anti-Defamation League, 2004 WL 2911167, *25),

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group of amici, National School Boards Association, et al., supports neither party, but urges the Court to replace *Lemon* with an endorsement test. This disparity alone signals a serious concern with the continued viability of the *Lemon* test.

[4] As Mr. Justice Kennedy has commented, the Court has embraced a "jurisprudence of minutiae." *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring and dissenting).

and that because the Texas display lies on the exact line between the legislature, the governor's office, and the supreme court, it constitutes an impermissible endorsement of religion. *See* Brief of Amicus Curiae Council for Secular Humanism, 2004 WL 2899174, *13.[5]

B. In Practical Effect, *Lemon* Favors Irreligion over Religion.

The *Lemon* test has effectively codified anti-religion, not neutrality, as the status quo. *See, e.g., Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 780 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002) (Coffey, J., dissenting) (using *Lemon* to find passive Ten Commandments monument in violation of Establishment Clause has brought us "to a point where irreligion is favored over religion"). Employing *Lemon*, organizations and individuals bent on removing all vestiges of religion from the public square have successfully petitioned the courts to strike everything from crèche displays to crosses on city seals to a sticker in science textbooks explaining that evolution is a just a theory. *See, e.g., American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435 (3d Cir.), *cert. denied*, 520 U.S. 1265 (1997); *American Civil Liberties Union v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998); *Selman v. Cobb County Sch. Dist.*, 2005 WL 83829 (N.D. Ga. 2005).[6]

[5] This sort of landscape argument led Judge Coffey of the Seventh Circuit to warn that courts "should not be in the business of monument design." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 776 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002) (Coffey, J., dissenting).

[6] In *Selman*, the sticker read in its entirety stated: "This textbook contains material on evolution. Evolution is a theory, not a fact,

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Additionally, although this Court has repeatedly stated that the Establishment Clause forbids hostility against religion, *e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989), under *Lemon*, government hostility toward religion has routinely been upheld. *See, e.g., American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1119, 1122-23 (9th Cir.), *cert. denied*, 537 U.S. 886 (2002) (upholding resolution condemning Christian ministries' "hateful rhetoric against gays" in their "Truth in Love" campaign offering hope for change from homosexuality through Jesus Christ; holding that primary effect of resolution was not hostility, but "encouraging equal rights for gays and discouraging hate crimes"); *Okwedy v. Molinari*, 69 Fed. Appx. 482, 2003 WL 21492487 (2d Cir. 2003) (ministry's public display of Bible verse on billboard was declared by Borough President Guy Molinari to be "mean-spirited" and to "convey an atmosphere of intolerance which is not welcome in [New York City]," after which billboard was immediately removed by billboard owner, in breach of ministry's contract; Establishment Clause claim dismissed).

In practice, the *Lemon* test has been a one-way street: benign religious displays and symbols are condemned,

regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered." 2005 WL 83829, *4. Based on this simple statement, and applying the *Lemon* test, the judge reasoned that "[a]n informed, reasonable observer would understand the School Board to be endorsing the viewpoint of Christian fundamentalists and creationists that evolution is a problematic theory lacking an adequate foundation." *Id.* at *20.

while overt government hostility toward religion is condoned.[7] It is time for *Lemon* to be jettisoned.

C. *Lemon* Turns the Establishment Clause from a Shield Intended to *Protect* Religious Freedom into a Sword Used to *Harm* Religion.

The original intent of the Establishment Clause was both to prevent the establishment of a national church and to protect "individual states against federal interference with existing church-state relationships." DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW 65, 66 (1987); *see also, Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, 124 S.Ct. 2301, *2330 (2004) (Thomas, J., concurring) (citing AKHIL AMAR, THE BILL OF RIGHTS 36-39 (1998)). That is, it was adopted for the purpose of protecting religion and religious freedom. However, over time, the *Lemon* test has turned this shield into a sword wielded against the very religious freedom the Clause was initially designed to protect.

"To the extent that *Lemon's* purpose prong requires the government to turn a blind eye to the impact of its actions on religion, on the implicit assumption that secular effects are all that matter, it is a recipe for intolerance." Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 129 (1992). After all, hostility toward religion is itself a secular purpose.

[7] In fact, even purveyors of rank obscenity receive more protection under the First Amendment than those who wish to display the Ten Commandments in public, at least in the Western District of Pennsylvania. *See United States v. Extreme Associates, Inc.*, 2005 WL 121749 (W.D. Pa. 2005).

Conversely, when there is any hint of religious motive behind government action, however indirect, no stone is left unturned in the efforts to root it out and decree the act unconstitutional. *See, e.g., American Civil Liberties Union v. McCreary County*, 354 F.3d 438, 455-56 (6th Cir. 2003) (finding "evolution" of displays from religious motivation relevant to purpose prong of *Lemon*, notwithstanding sworn testimony to the contrary); *Baker v. Adams County*, *supra*, 86 Fed. Appx. 104, 110 ("The fact that the monument was donated by the Adams County Ministerial Association, a Christian religious organization that also agreed to indemnify the Board for any litigation expenses, implies" an illicit purpose under *Lemon*, irrespective of the school board's secular motive in accepting the monument.).

And while numerous cases have held government actions unconstitutional because they were found to have had a primary effect of *advancing* religion, "[n]o court in any jurisdiction has struck down a law that allegedly had the primary effect of *inhibiting* religion." *See* Andrew R. Cogar, Note, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. Va. L. Rev. 279, 310 (2002).

When religious practices have been permitted under *Lemon*, they have usually been those of a minority religion or sect, while even voluntary practices of a perceived mainstream religion are disallowed. For example, in *Mellen v. Bunting*, 327 F.3d 355, 371-372 (4th Cir. 2003), *cert. denied*, 124 S.Ct. 1750 (2004), the custom of offering a *voluntary* prayer in the Judeo-Christian tradition before the evening meal at Virginia Military Institute was held to

violate the Establishment Clause. By contrast, in *Yacovelli v. Moeser*, 2004 WL 1144183, *13 (M.D.N.C. 2004), a *mandatory* assignment for incoming freshmen to read a book containing lengthy portions of the Koran and listen to a recording of an Islamic imam chanting a call to prayer in Arabic was upheld.

Furthermore, in those rare instances in which a mainstream religious practice was upheld, courts have usually done so only when the practice was deemed stripped of all religious meaning. *See, e.g. Newdow, supra,* ___ U.S. ___, 124 S.Ct. 2301, 2323 (2004) (O'Connor, J., concurring) (some official references to God "can serve to solemnize an occasion instead of to invoke divine provenance," including the national motto, the national anthem, and the prayer with which this Court opens).

D. *Lemon* Fails to Provide Narrow Guidelines Ensuring Against Unbridled Judicial Discretion.

It has long been held by this Court that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *see also, Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). But while government officials from the executive branch are prohibited from abusing their discretion in the regulation of First Amendment conduct under the watchful eye of the judiciary, there are few restraints placed upon the judicial branch itself when deciding matters involving First Amendment religious freedoms.

It takes little imagination to envision the outcry that would result if a permit for a public demonstration was sought from a small-town police chief who had reserved discretion to select the appropriate guidelines from among several diverse and often conflicting choices, many of which called upon him to discern whether the applicant was motivated by any hidden religious purpose, or what the "reasonable observer" might surmise as to the primary effect of the demonstration. Such a permit scheme would be stricken as blatantly unconstitutional. Yet this Court's Establishment Clause jurisprudence allows just such unbridled discretion to be exercised by the judiciary.

While this Court's First Amendment jurisprudence concerning licensure of speech is rooted in objective criteria, the *Lemon* test is by nature essentially subjective. *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) (requiring objective guidelines to limit discretion of the licensor).

For example, the endorsement test does not offer any real objective standard. For the "reasonable observer" knows only what a court posits he knows, and believes only what the court imputes to him. In truth, the reasonable observer prong serves no legitimate purpose other than to cloak the subjective predilections of the court in the garb of objectivity. As Mr. Justice Scalia has stated, the endorsement test "supplies no standard whatsoever." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995).[8]

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[8] The inherent subjectivity of the analytical tests used in this area of the law may explain why, according to one report, "the single most prominent, salient, and consistent influence on judicial decisionmaking

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Similarly, to uphold an inherently religious practice on grounds of "ceremonial deism" is to strip it of all true religiosity. As Justice O'Connor wrote in support of the constitutionality of the Pledge of Allegiance, "only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism." *Newdow, supra*, 124 S.Ct. at *2324 (O'Connor, J., concurring). To constitute ceremonial deism, it "cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority." *Id.* at *2325; *see also Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (suggesting that the reference to God in the Pledge might be permissible because it had "lost through rote repetition any significant religious content"). That is, only because the phrase "under God" was deemed to have lost its religious meaning, it would pass muster under the "ceremonial deism" analysis. This test is therefore just another variation on the decades-old theme of favoring irreligion over religion.

As if that were not enough, the Court has also reserved to itself the right to dispense with *Lemon* altogether whenever it chooses to do so, leaving government officials and the public in confusion as to what standard will apply in the future and how it will be interpreted. Such a system may have been appropriate for an ancient Greek city-state seeking an oracle, but it will not suffice

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was religion – religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community." Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, *Searching For The Soul Of Judicial Decisionmaking: An Empirical Study Of Religious Freedom Decisions*, 65 Ohio St. L.J. 491, 614 (2004).

for America, which boasts itself a nation of laws and not of men.

II. THE ESTABLISHMENT CLAUSE HAS NO APPLICATION TO THE INSTANT CASES.

The Establishment Clause properly understood does not apply to the instant cases at all, as noted by Mr. Justice Thomas in *Newdow*, *supra,* at *2328, and demonstrated by other amici. *See, e.g.,* Brief of Amici Curiae Conservative Legal Defense and Education Fund, et al., 2004 WL 2812087, *10; Brief of Amicus Curiae Eagle Forum Education and Legal Defense Fund, 2825470, *9.

For many years, this Court recognized a jurisdictional limitation on the application of the Clause to the states. *See, e.g., Barron v. Baltimore*, 32 U.S. (7 Peters) 243, 250 (1833) ("These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."); *Ex parte Garland*, 71 U.S. 333, 397-98 (1867) ("the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions").

And the passage of the Fourteenth Amendment did not alter this fact.[9] *See, e.g., Jaffree v. Board of School Com'rs of Mobile County*, 554 F.Supp. 1104, 1119 (D.Ala. 1983), *aff'd in part, rev'd in part*, 705 F.2d 1526, *rev'd*, 472 U.S. 38 (1985) ("The historical record clearly establishes

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[9] It has been said that incorporation of the Establishment Clause is "logically impossible; it would be like trying to apply the Tenth Amendment to the states." *See* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 95 (1987).

that when the fourteenth amendment was ratified in 1868 that its ratification did not incorporate the first amendment against the states."); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74-78 (1873).[10]

III. AN ALTERNATIVE TO *LEMON*

Given the frequent though inconsistent use of *Lemon*, its longevity, and the wide acquiescence in the fiction of incorporation, it is unlikely this Court will forego all application of the Establishment Clause against state action. In light of this probability, Amicus suggests the following alternative to the *Lemon* test.

As a threshold matter, it is necessary to set out the goals of a new test. First, an analytical device for determining the constitutionality of a governmental practice under the Establishment Clause requires clarity, simplicity, and objectivity. After all, the text itself is only ten words; to require numerous different analytical tests depending on the category of activity at issue is at best unnecessary and at worst meaningless. Surely the drafters did not envision or intend such complexity.

Second, the test should apply universally to all claims brought under the Clause, whether they involve silent

[10] Between 1870 and 1950 the Blaine Amendment or similar proposals, which would have made the First Amendment applicable to the states, were considered and rejected by Congress on at least 25 occasions. *See* DREISBACH, *supra*, at 92. Obviously, had Liberals and others believed the Fourteenth Amendment had already "incorporated" the Bill of Rights, passage of the Blaine Amendment would have been superfluous. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 296-302 (2002). Neither did the Liberals find any legal significance to Jefferson's letter to the Danbury Baptists. *Id.* at 302 n.39.

displays of religious symbols, public proclamations of faith, or preferential financial treatment. The touchstone of true law is universality. The ideal of "equal justice under law" is not attainable unless the same law applies to all. *See* Ashley M. Bell, *"God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled With The Secularization Of Historical Religious Expressions*, 50 Am. U. L. Rev. 1273, 1280 (2001) (suggesting need for single test).

With these goals in mind, Amicus offers the following alternative.

A. The Establishment Clause Should not Apply Absent Legislative Action.

Even if the fiction of incorporation is to be maintained, the plain text of the First Amendment should nonetheless be the starting point for determining applicability of the Clause. "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. O'Keefe*, 306 U.S. 466, 491-492 (1939) (Frankfurter, J., concurring).

The text specifically addresses a "law" respecting an establishment of religion. It would therefore be altogether reasonable and appropriate for this Court to restrict the application of the Establishment Clause only to acts of a legislative body, whether state or federal, constituting some sort of "law," and not to the erection of passive displays such as those here at issue. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 221 (1963) (the Establishment Clause "withdrew all *legislative* power respecting religious belief or the expression thereof.") (emphasis added). According to BLACK'S LAW

DICTIONARY, a "law" is "[t]hat which must be obeyed and followed by citizens subject to sanctions or legal consequences." BLACK'S LAW DICTIONARY 795 (5th ed. 1979).

Application of this threshold requirement would immediately dispense with cases such as *McCreary County*, since it involves no legislative action. *Van Orden* would also be affirmed because mere acceptance of the monument involved no enactment of a "law."[11]

B. The Establishment Clause Should not Apply Absent Legal Coercion.

Prior to *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), protection against the threat of legal coercion constituted the essence of the Establishment Clause. True establishment at the time of the founding required actual legal coercion, such as requiring official oaths recognizing the king as head of the church, the funding of tax-supported ministers, and fines for those whose children had not been baptized. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment Of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116-2119 (2003) (citing Virginia laws as representative of many throughout the South); *see also, Newdow, supra,* *2331-32 (Thomas, J., dissenting) ("[t]he traditional 'establishments of religion' to which the Establishment Clause is addressed necessarily involve actual legal coercion"); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments

[11] As Chief Justice Rehnquist has counseled, "[w]hen courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies." *Newdow, supra,* at *2320 (Rehnquist, C.J., concurring).

of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.") (emphasis in original).

As McConnell summarized: "In short, the laws compelled religious observance, provided financial support for the ministry, controlled the selection of religious personnel, dictated the content of religious teaching and worship, vested certain civil functions in church officials, and imposed sanctions for the public exercise of religion outside of the established church." *Establishment and Disestablishment at the Founding, supra,* 44 Wm. & Mary L. Rev. at 2119. These practices were unabashedly coercive, and plainly violated the conscience of philosophical dissenters.

1. The Model of *Barnette*

Perhaps the seminal case applying the sort of coercion test most true to the original understanding of the Establishment Clause and the historical practice of our nation is *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, Jehovah's Witnesses challenged a mandatory flag salute for public school students, which the Court found required "a compulsion of students to declare a belief." *Id.* at 631. Failure to conform constituted insubordination punishable accordingly.

As stated by the *Barnette* Court, the issue presented was "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." *Id.* at 636. In striking the law, the Court famously cautioned that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641.

Barnette teaches that "the Bill of Rights denies those in power any legal opportunity to coerce that consent." *Id.* In our free system, there is no place for forced consent: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

The Court ultimately held that the compulsory flag salute violated the First Amendment because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*

2. Fashioning a *Barnette*-Type Test

Although a majority of this Court has not insisted on a showing of coercion in an Establishment Clause challenge, *see, e.g., Engel v. Vitale,* 370 U.S. 421, 430 (1962), the element of coercion has played an important role. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-316 (2000) (applying coercion test in addition to *Lemon*); *Lee v. Weisman*, *supra*, 505 U.S. at 592 (finding "subtle coercive pressure" in the public schools). *But see Lee*, 505 U.S. at 618 (Souter, J., concurring) (arguing that "this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement" and collecting cases).

Yet the refusal of the Court to require some coercive effect in challenges brought under the Establishment Clause accounts for much of the proliferation of such cases

and the resulting confusion in this area of law.[12] Moreover, the absence of a requirement of some harm other than a psychological offense has paved the way for the proverbial "egg-shell" plaintiff, who has lost all respect for any belief system not her own, and assumes an attitude of deep offense by the slightest acknowledgement of any conflicting beliefs. Judge Michael McConnell argues that "courts are wasting their time when they draw nice distinctions about various manifestations of religion in public life that entail no use of the taxing power and have no coercive effect. The simple answer to most such lawsuits is that the plaintiff has no standing to sue." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 939 (1985/86).

While the precise contours of what constitutes coercion may need to be worked out over time, use of an orthodoxy of belief standard would readily accommodate the pluralism of belief prevalent today but allow public officials to recognize religion without fear of a federal lawsuit. And as Judge McConnell noted, "at least attention again would be directed to the right question. Not what flunks the three-part test, but what interferes with religious liberty, is an establishment of religion." *Id.* at 941.

Finally, if such a test would not offer every citizen offended by governmental recognition of religion an avenue of judicial relief, perhaps it would facilitate a process whereby our increasingly pluralistic populace

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[12] *Cf.* the observation of Mr. Justice Thomas in *Newdow, supra*: "I conclude that, as a matter of our *precedent*, the Pledge policy is unconstitutional." *Id.* at *2330 (emphasis added). Of course, Justice Thomas went on to state that in his opinion, that precedent was wrongly decided. *Id.*

would be required to respect differing beliefs rather than file suit over them.

The hoped-for neutrality of the *Lemon* test has in reality spawned judicially-sanctioned hostility toward religion. Under the proposed legal coercion test, the "benevolent neutrality" of *Walz*[13] may again become a reality while still protecting against actual establishment of a national religion and not unduly offending non-adherents.

CONCLUSION

For the reasons stated, the *Lemon* test should be overruled, and this case affirmed.

Respectfully submitted,

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[13] "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 669 (1970).